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No. 84-806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BUCKINGHAM CORPORATION,

Petitioner,

—v.—

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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On Friday, May 24, 1985, seven weeks after the Court invited the Solicitor General to express the views of the United States in this case, the government served and filed a typescript version of its memorandum as amicus curiae. Petitioner, The Buckingham Corporation, submits this supplemental brief to make two brief comments on the government's memorandum.

1. The government agrees that "the district court correctly granted the motion for a directed verdict" and that the court of appeals' decision "is incorrect." Nevertheless, the government says that the petition should be denied because "the primary question in this case is whether [the] standard [of *Monsanto Company* v. *Spray-Rite Service Corporation*, 104 S. Ct. 1464 (1984)] was properly applied—a wholly factbound issue." The government's description is incorrect, and inconsistent with

other statements in the government's own memorandum. It seriously underestimates the importance of the issue presented here.

In the first place, the case is not "factbound," to the extent that term conveys the impression that the case turns on disputed questions of fact. As the government's submission states, "the record shows little disagreement concerning the events preceding the termination, although the parties sharply dispute the inferences to be drawn therefrom." As the government's memorandum also shows, the determinative events are few in number. The question presented is a legal one—whether the standard of *Monsanto* was correctly applied to the commonplace and largely undisputed circumstances of this case, in accordance with this Court's remand to the Ninth Circuit.

The proper application of *Monsanto* is an issue of the utmost importance to hundreds (if not thousands) of firms that distribute their products through independent dealers. As the government's memorandum acknowledges, the evidence presented here was considerably weaker than that considered in *Monsanto*; if a case can get to the jury on the basis of the showing made by respondent here, the termination of dealers in the interest of economic efficiency will be impossible as a practical matter, and the underlying objective of *Monsanto* will be defeated.

Published or unpublished, the court of appeals' decision is an incorrect ruling that will influence the advice of counsel and the behavior of businessmen in ways that undercut the policies articulated in *Monsanto*. The decision has already been reported in the primary service used by antitrust counsel. 47 Antitrust & Trade Reg. Rep. (BNA) 478 (September 13, 1984). It has also received substantial attention in trade publications. *See, e.g., Buckingham case revives "Fair Trade" question*, 3 Computer & Software News No. 17, at 4 (April 29, 1985), which stated:

> Although the Supreme Court had not yet agreed to review [the Ninth Circuit's] decision at presstime, the

> *Buckingham* case is being watched closely by Justice Department antitrust officials, Congress and industry groups.
>
> The reason this case is attracting so much attention is that the outcome of the dispute will affect the pricing and distribution of virtually all consumer and business products, including personal computers and software.[1]

The existence of other inconsistent Ninth Circuit decisions adds to the confusion and constitutes a reason for granting certiorari, not denying it.

2. The government's memorandum does not mention Point III of the petition for certiorari, which contends that, if there is to be another trial, this Court should direct that the rule of reason, rather than the *per se* rule, be applied in determining whether there was unlawful vertical price-fixing. The omission is the product of a commitment made to Congress by former Assistant Attorney General McGrath in the course of congressional consideration of the Department of Justice appropriations bill for fiscal year 1985. Mr. McGrath assured the conference committee that no funds appropriated for the Department would be used to advocate application of the rule of reason, rather than the *per se* rule, in vertical price-fixing cases. See H.R. Conf. Rep. No. 952, 98th Cong., 2d Sess. 40-41 (1984):

> Amendment No. 142: Deletes a general provision proposed by the House which would have prohibited funds appropriated by this Act for the Justice Department and the FTC from being used to alter the per se rule on resale price maintenance. The conferees deleted this provision as a result of assurances by the Assistant Attorney General for Antitrust that the Justice Department will respect the position of the conferees on this issue. The conferees remain adamantly opposed to any Justice Department or

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1 The full text of the article is annexed as Appendix A.

FTC actions that would alter or overturn the prohibition on resale price maintenance and expect that the current law on this matter will be properly enforced.

In *Monsanto*, the United States filed a brief as amicus curiae in which it urged the Court "fully to reexamine the legal status of resale price maintenance" and to address the question whether the *per se* rule should apply to vertical price restrictions. 82-914 Br. for the United States as Amicus Curiae on Petition for Writ of Certiorari 15-18 (filed Jan. 3, 1983). Under the circumstances, the government's failure to discuss the *per se* issue in its memorandum here should not be deemed a departure from the position taken by the government in *Monsanto*.[2]

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2 The Court's decision in *Monsanto* did not address the question whether the *per se* doctrine should be applied in vertical price-fixing cases, because the question was not raised below. 104 S. Ct. at 1469-1470 n.7. This issue was squarely presented at the trial of the case at bar.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition and Reply Brief, we ask the Court to grant a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit.

Dated: May 30, 1985

Respectfully submitted,

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Appendix A

WASHINGTON REPORT

Buckingham case revives 'Fair Trade' question

WASHINGTON—May manufacturers legally terminate existing distributors in response to shifts in the marketplace? Certainly—it happens all the time, particularly in fast-changing fields like the computer and software industry.

But what if the terminated distributor happens to be a discounter or a suspected diverter believed to be supplying unauthorized price-cutting retailers? And what if the termination occurred after competing distributors complained to the manufacturer of the discounter's pricing practices?

Supposedly, those questions were answered by the Supreme Court last year in the *Monsanto* resale price maintenance ruling.

In that case, the Court upheld the *per se* or automatic illegality of RPM conspiracies between dealers and suppliers, but established tough new rules of evidence for establishing the existence of such a conspiracy.

Among other things, the Supreme Court held that "complaints about price cutters" are "natural" and "unavoidable reactions by distributors to the activities of their rivals."

Allowing an illegal RPM conspiracy "to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct," the Court said in *Monsanto*.

Now, however, a new case has reached the Supreme Court charging that the lower courts are not following the Monsanto doctrine and asking for sweeping changes in the antitrust ground rules governing resale price fixing.

In that case, a liquor importer (Buckingham) terminated one of its Arizona Cutty Sark Scotch wholesalers following discussions with a competing distributor about the firm's discount pricing practices.

The United States Court of Appeals for the Ninth Circuit ordered Buckingham to stand trial for engaging in an alleged RPM conspiracy despite admittedly weak evidence of any such agreement.

According to attorneys for Buckingham, the Ninth Circuit's decision ignores the Supreme Court's *Monsanto* standard which requires that RPM charges be dismissed unless there is evidence "that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently."

The Appeals Court ruling "undermines the important economic objective" that the Supreme Court sought to achieve in *Monsanto*, and as a result "many inefficient distribution systems will remain unchanged because" suppliers will be reluctant to terminate any discounting dealer or distributor, they argued.

Although the Supreme Court had not yet agreed to review that decision at presstime, the *Buckingham* case is being watched closely by Justice Department antitrust officials, Congress and industry groups.

The reason this case is attracting so much attention is that the outcome of the dispute will affect the pricing and distribution of virtually all consumer and business products, including personal computers and software.

Buckingham is not merely asking that the Court reverse the Ninth Circuit on the standard of evidence in dealer termination cases. The company has also asked the Supreme Court to overturn the longstanding legal precedent under which all resale price maintenance agreements have been banned as *per se* illegal under the Federal antitrust laws.

Because "resale price maintenance is frequently procompetitive, the *per se* rule should not apply to any vertical price restrictions," lawyers for the supplier told the Supreme Court.

Although the Justice Department made a similar argument in last year's *Monsanto* RPM case, the Court dodged the question of the legality of resale price fixing conspiracies because it was never directly raised by either of the parties in that case.

In *Buckingham*, the *per se* issue is a central element in the supplier's case, and many legal experts believe the Supreme Court may finally be forced to decide whether the United States will return to the "Fair Trade" era.